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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of:)
)
PROGRAMMING EXCLUSIVITY)
CONTRACTS OF DIRECT)
BROADCAST SATELLITE)
PROVIDERS,)

To: The Commission

REPLY COMMENTS
OF THE TRINITY BROADCASTING NETWORK
AND TRI-STATE CHRISTIAN TELEVISION

Colby M. May, Esq.
COLBY M. MAY, ESQ., P.C.
205 3rd Street SE
Washington, DC 20003
(202) 544-5171

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October 31, 2003

REPLY TO COMMENTS

Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network (“Trinity”), and Tri-State Christian Television, Inc. (“Tri-State”), by their attorney, present the following comments in reply to those submitted by various parties in Commission Docket No. MB 03-206, Programming Exclusivity Contracts of Direct Broadcast Satellite Providers.

INTRODUCTION

The instant proceedings, at their core, relate to a problem that is best understood as one of relegation. Under the terms of the Echostar/Dominion agreement, religious, Christian programming is relegated to the comparatively tiny audience of Dominion, while all other content of programming may be delivered to the significantly larger Echostar audience, free from the constraints of the Echostar/Dominion agreement. To say that such relegation is problematic is to understate the matter.

The present circumstances may best be understood by analogy to a hypothetical common carrier case. In such hypothetical case, all airline passenger transport is provided by two, or at most three, carriers. Imagine that two of those three carriers privately agree that they will engage in a division of services: one carrier, with eight times the capacity of the other, agrees not to provide passenger seating to religious, Christian air travelers, and to direct such travelers to the other carrier. The incentive for surrendering this passenger base is the willingness of the smaller carrier to surrender premium gate access at regional hub airports. As a consequence, the smaller airline is saved from collapse by the coercive relegation of religious, Christian passengers to its reduced amenities. In exchange, the larger airline acquires important additional capital and capacity.

While the airlines might conclude that such a circumstance presents no important question of public interest, or that such private adjustments to the market that distort, steer, or co-opt it do not threaten the public interest, in the view of Trinity and Tri-State, there is a clear injury to the public interest in such distortions. For programmers, the reduced audience share available through Dominion carriage puts in question the economic sense of a judgment to expend the considerable funds necessary for the production of quality programming. For viewers, the artificial manipulation means that they are unnecessarily forced to choose: take Dominion's service, and forego all programming that is not religious, Christian in nature; take Echostar's service, and forego all programming that is religious, Christian in nature; or, take both services with the unnecessarily compounding of expenses. Plainly, only Echostar and Dominion benefit by the arrangement, and the public interest is harmed by it. *See Turner Broadcasting System v. FCC*, 520 U.S. 180, 194 (1997) ("Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation").

It is precisely this injury to the public interest, or the high likelihood that such injury exists and can be quantified, that justifies a decision by the Commission to examine this issue.

Reply to Comments of American Distance Education Consortium

The American Distance Education Consortium ("ADEC"), a consortium of land grant colleges and universities, submitted comments on behalf of its members. In its single page comment, ADEC asserts, first, that it has made numerous unsuccessful applications for carriage of its member's distance education programming on the educational and informational set-aside channels held by Echostar," and second, that it is unable to compete "on a level playing field"

with Daystar Television Network because Daystar “has negotiated carriage on the set-aside channels by offering enormous financial benefits to Echostar in exchange for carriage.”

ADEC fails to recognize that once Echostar has triggered the "local into local" must carry requirements in a market, it is required to carry *all* the qualifying local over the air broadcasting stations. In the real world circumstances of this day, Echostar has made such triggering, local into local carriage decisions in some 71 markets across the United States. If a Commission licensee broadcasts qualifying signals in more than one of those markets, Echostar is compelled by the must carry requirement to allocate signal space for each such licensed signal, in order to meet its must carry obligation. In those circumstances, reason, efficiency, and the Commission's rules sensibly afford to Echostar and that licensee the means to satisfy the must carry requirements without unnecessarily duplicating signals. *See* Comments of Echostar Satellite Corporation, at 6-10. While the secondary effect of such carriage agreements is to save money and satellite frequency space, the primary purpose and effect of such agreements is to insure that local into local must carry obligations are satisfied.

Reply to Comments of Echostar Satellite Corporation

Echostar submitted comments on its own behalf.

Echostar makes four points in its comments.

First, Echostar notes that if the exclusivity agreement between it and Dominion are enforced, Echostar "may well result in Echostar's inability to meet" its public interest programming requirements. Second, Echostar asks the Commission to render a specific finding with respect to Daystar's qualifications as an educational programmer, so that it can determine how to proceed with respect to its carriage agreement with Daystar, an agreement premised on

Daystar's status as an educational programmer. Third, Echostar takes Dominion to task for "an amazing case" of double-speak, by which Dominion seeks to avert Commission examination of its contractual arrangement with Echostar while calling on the Commission to examine and to void the contractual arrangement for carriage between Echostar and Daystar. *See* Echostar Comments, at 6. Fourth, Echostar explains that the local into local carriage waiver agreement between it and Daystar does not, Dominion's arguments to the contrary notwithstanding, violate the Commission's rules. *See* Echostar Comments, at 6-10.

Echostar is quite correct that Section 25.701 leaves Daystar free to waive its local into local carriage rights, and to be included as an educational set-aside channel. Daystar's waiver of its rights does not run afoul of the consideration paid portion of Section 25.701.

Reply to Comments of Dominion Video Satellite, Inc.

Dominion Video Satellite, Inc., submitted comments on its own behalf, supplementing its prior opposition to Daystar's request for a Section 403 inquiry and for a declaratory ruling.

Dominion asserts three points in its comments: (1) Dominion urges the Commission to deny Daystar's request on the ground that Daystar omits to allege any Commission rule prohibits a DBS provider from entering into an exclusivity agreement; (2) Dominion argues that Daystar's request relies upon inapposite rules; and, (3) Dominion argues that its exclusivity arrangement with Echostar is not inconsistent with the public interest.

Two points deserve particular note with respect to Dominion's comments.

First, Dominion acknowledges that even with respect to pre-existing exclusivity agreements such as it has with Echostar, such exclusivity agreements "must yield" to the "local into local" must-carry requirements of Section 76.66 of the Commission's Rules. That

concession is important because the triggering event of the DBS "local into local" must-carry requirement is the entirely *voluntary* action of a DBS provider, such as Echostar, to begin transmission of a local, over the air, channel into its local broadcasting area. In other words, despite the putative certainty of a written agreement, the entirely unilateral and voluntary act of one party to the contract can void the exclusivity of carriage required under the contract.

Second, Dominion's focus on the question of the impact on the public interest emphasizes the importance of the public interest considerations raised by Trinity and Tri-State in their previously submitted comments. In addressing the impact on the public interest, however, Dominion plays a game of sleight of hand. Purporting to address the impact of exclusivity on the public interest, Dominion instead turns its discussion of this point to the purpose of showing that its capacity to maintain a niche market (the exclusive DBS provider, as between it and Echostar, of religious, Christian programming) is essential to its survival: "Exclusive access to a niche market is fundamental to Dominion's business," *see* Comments of Dominion Video Satellite Inc., at 5; "[i]t is critically important to Dominion's survival that the exclusivity provisions remain intact," *id.* But the question of the public interest goes beyond the maintenance of artificial market constructs created by Dominion and Echostar that Dominion now concedes are fundamental to, critical to, its survival.

When Dominion finally does turn to the larger questions of the public interest, it asserts, "Echostar has discretion to allocate public interest capacity among programmers. Implementing that allocation by means of a contract that limits the number of public interest channels it broadcasts within a particular genre is not contrary to any Commission rule or policy." *Id.* at 6. That description of the exclusivity agreement between Echostar and Dominion rather understates

the case. As Dominion would have it, Echostar may commit itself to a menu of DBS broadcasting guaranteed to be devoid of religious, Christian programming; likewise, Dominion may "corner the market" on the religious, Christian programming expurgated from Echostar. In doing so, Echostar and Dominion can force DBS subscribers who seek access to first run movies, pay-per-view sports events and Christian programming to suffer from artificially increased expenses related to the purchase and maintenance of two separate DBS systems, Echostar's and Dominion's.

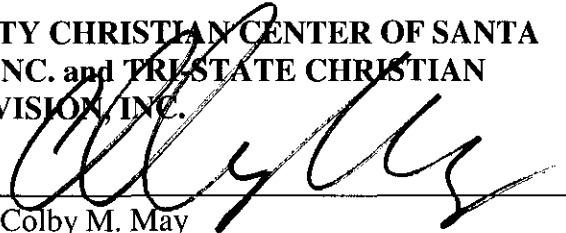
Dominion blithely asserts that Echostar can close the DBS market entirely to religious, Christian programming, even absent its agreement with Dominion, and seems thereby to suggest that the exclusivity arrangements must, therefore, be permissible. Curiously absent from the assertion by Dominion is any supporting legal authority. The decision to artificially manipulate the market in such ways certainly seems within the reach of federal antitrust and anticompetitive practices laws. Dominion fails to demonstrate why those principles and laws are inapplicable to Echostar or to it, or to their anticompetitive arrangements.

CONCLUSION

In the public interest, the Commission should undertake a complete examination of exclusivity arrangements and their impact on the public interest.

Respectfully submitted,

**TRINITY CHRISTIAN CENTER OF SANTA
ANA, INC. and TRISTATE CHRISTIAN
TELEVISION, INC.**

By: 
Colby M. May
Their Attorney

COLBY M. MAY, ESQ., P.C.

205 3rd Street SE

Washington, DC 20003

(202) 544-5171

October 31, 2003

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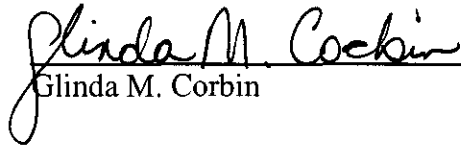
I, Glinda M. Corbin, Office Manager in the Law Office of Colby M. May, hereby certify that I have caused to be sent, this 31st of October 2003, via First Class U.S. Mail, postage prepaid, a true and correct copy of the foregoing REPLY COMMENTS to the following counsel:

Robert L. Olender
James A. Koerner
Koerner & Olender, P.C.
5809 Nicholson Lane
Suite 124
North Bethesda, MD 20852

James E. Dunstan
Garvey Schubert Barer
1000 Potomac Street, NW
Fifth Floor
Washington, DC 20007-3501

David O'Connor
Holland & Knight LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006

Janet K. Poley
P.O. Box 830952
Lincoln, NE 68583-0952


Glinda M. Corbin

Law Office of Colby M. May
205 Third Street, SE
Washington, DC 20003
(202) 544-5171
(202) 544-5172 (fax)

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